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No. 95-1340

In the Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF *AMICUS CURIAE*
NORTHROP GRUMMAN CORPORATION
IN SUPPORT OF PETITIONER
HUGHES AIRCRAFT COMPANY**

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TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF <i>AMICUS CURIAE</i>	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	8
A. The Amended FCA's Elimination of the "Prior Government Knowledge" Defense to a <i>Qui Tam</i> Action Cannot Be Applied Retroactively to a Case in Which the Government Acquired Its Knowledge Prior to the Enactment of the Amended Statute	8
1. Application of the Amended § 3730 in the Instant Case Would Have a "Retroactive Effect" Within the Meaning of <i>Landgraf</i>	9
2. The Ninth Circuit's Reasons for Retroactively Applying the Amended § 3730 to This Case Are Fatally Flawed	11
a. Under <i>Landgraf</i> , "Jurisdictional" Provisions Are Governed by the Same Retroactivity Principles As Other Legislation	12
b. In Any Event, the Amended § 3730 Is Not a "Jurisdictional" Provision Within the Meaning of <i>Landgraf</i>	14
c. <i>Landgraf</i> Makes Clear That the Amended § 3730 May Not Be Applied Retroactively Even Though It Does Not Alter the Underlying Obligations of the Contractor ..	15
d. The Amended § 3730 Must Not Be Applied Retroactively Because It Alters the Substantive Rights of the Government	18

B. At A Minimum, the Amended FCA's Elimination of the "Prior Government Knowledge" Defense to a <i>Qui Tam</i> Action Cannot Be Applied Retroactively to a Case That Was Filed Prior to the Enactment of the Amended Statute	20
CONCLUSION	24

Page

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Andrus v. Charlestone Stone Products Co.</i> , 436 U.S. 604 (1978)	12
<i>Bruner v. United States</i> , 343 U.S. 112 (1952)	12
<i>Chenault v. United States Postal Service</i> , 37 F.3d 535 (9th Cir. 1994)	16
<i>Hallowell v. Commons</i> , 239 U.S. 506 (1916)	12, 13
<i>Herm v. Stafford</i> , 663 F.2d 669 (6th Cir. 1981) ...	16
<i>Hyatt v. Northrop Corp.</i> , 1988 WL 156739 (C.D. Cal. 1988)	3
<i>Hyatt v. Northrop Corp.</i> , 80 F.3d 1425 (9th Cir. 1996), <i>petn. for cert. pending</i> , No. 96-17 (filed July 2, 1996)	<i>passim</i>
<i>International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.</i> , 429 U.S. 229 (1976)	16
<i>Kaiser Aluminum & Chem. Corp. v. Bonjorno</i> , 494 U.S. 827 (1990)	8, 21, 22
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244 (1994)	<i>passim</i>
<i>Pettis ex rel. United States v. Morrison- Knudsen Co.</i> , 577 F.2d 668 (9th Cir. 1978) ...	9, 10, 22
<i>Republic National Bank v. United States</i> , 506 U.S. 80 (1992)	12
<i>Rivers v. Roadway Express, Inc.</i> , 511 U.S. 298 (1994)	16
<i>Stephens v. Cherokee Nation</i> , 174 U.S. 445 (1899)	13
<i>The Assessor v. Osbornes</i> , 9 Wall. (76 U.S.) 567 (1870)	13

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>United States ex rel. Anderson v. Northern Telecom, Inc.</i> , 52 F.3d 810 (9th Cir. 1995), cert. denied, 116 S. Ct. 700 (1996)	9
<i>United States ex rel. Lindenthal v. General Dynamics Corp.</i> , 61 F.3d 1402 (9th Cir. 1995) ..	11, 17
<i>United States ex rel. Schumer v. Hughes Aircraft Co.</i> , 63 F.3d 1512 (9th Cir. 1995)	passim
<i>United States ex rel. Texas Portland Cement Co. v. McCord</i> , 233 U.S. 157 (1914)	23
<i>United States ex rel. Wisconsin v. Dean</i> , 729 F.2d 1100 (7th Cir. 1984)	9, 10
<i>United States v. Alabama</i> , 362 U.S. 602 (1960)	12
<i>United States v. Fernandez-Toledo</i> , 749 F.2d 703 (11th Cir. 1985)	24
<i>United States v. Kimberlin</i> , 776 F.2d 1344 (7th Cir. 1985), cert. denied, 476 U.S. 1142 (1986)	16
<i>United States v. TRW, Inc.</i> , 4 F.3d 417 (6th Cir. 1993), cert. denied, 114 S. Ct. 1370 (1994)	19
<i>United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.</i> , 209 U.S. 306 (1908)	23
<i>Wang v. FMC Corp.</i> , 975 F.2d 1412 (9th Cir. 1992)	14
<i>Winfree v. Northern Pacific Ry. Co.</i> , 227 U.S. 296 (1913)	17

TABLE OF AUTHORITIES

Statutes and Rules

	<u>Page</u>
28 U.S.C. § 1961	21
31 U.S.C. § 3730	passim
Pub. L. No. 99-562, 100 Stat. 3153 (Oct. 27, 1986)	1
Supreme Court Rule 37	1, 4

Authorities

Waldman, <i>The 1986 Amendments to the False Claims Act: Retroactive or Prospective?</i> , 18 Pub. Cont. L.J. 469 (1989)	9
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Pursuant to Supreme Court Rule 37.3, *amicus curiae* Northrop Grumman Corporation respectfully submits this brief urging this Court to reverse the judgment of the Court of Appeals in this case and to hold that section 3 of the False Claims Amendments Act of 1986,¹ which eliminated the "prior government knowledge" defense to a *qui tam* action under the False Claims Act, does not apply retroactively to a case in which the government acquired its knowledge of the relevant allegations prior to the enactment of the amended statute.

¹ See Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3154 (Oct. 27, 1986) (amending 31 U.S.C. § 3730).

This brief is filed with the consent of both petitioner and respondent, and letters reflecting those consents have been lodged with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Northrop Grumman Corporation ("Northrop") has a direct interest in the outcome of this case because Northrop currently has pending before this Court a petition for a writ of certiorari raising a virtually identical issue concerning the retroactivity of the 1986 amendments to the False Claims Act ("FCA"). See Pet. for a Writ of Cert., *Northrop Grumman Corporation v. United States ex rel. Michael A. Hyatt*, No. 96-17 (filed July 2, 1996) ("Hyatt Pet.").

In the *Hyatt* case, former Northrop employee Michael A. Hyatt filed a complaint against Northrop under the *qui tam* provisions of the FCA on October 3, 1986 — *i.e.*, more than three weeks *before* the amended FCA was enacted on October 27, 1986. See *Hyatt v. Northrop Corp.*, 80 F.3d 1425, 1427 (9th Cir. 1996). At the time of filing, all of the allegations raised in the *Hyatt* complaint already were known to the government, in part because of voluntary disclosures made by Northrop after conducting internal investigations. *Hyatt Pet.* at 2-3.

After reviewing Hyatt's complaint, the United States government declined to intervene. Instead, the government filed a brief in the district court arguing that Hyatt's *qui tam* claim was barred by the "prior government knowledge" defense set forth in 31 U.S.C. § 3730(b)(4) (1982), which provided that a *qui tam* action shall be dismissed if it is "based on evidence or information the Government had when the action was brought." See *Hyatt*, 80 F.3d at 1427. The government acknowledged that this defense had been repealed when § 3730 was completely rewritten by the FCA amendments that took effect on October 27, 1986, but the

government argued that this repeal could not be applied retroactively to a case filed before that date. See *Hyatt Pet.* at 4-5 (citing government's brief). After Northrop and Hyatt filed briefs respectively supporting and opposing the government's position, the district court held that the amended § 3730 could not be applied retroactively and that Hyatt's *qui tam* suit therefore was barred by the prior government knowledge defense. *Hyatt v. Northrop Corp.*, 1988 WL 156739 (C.D. Cal. 1988).

The Ninth Circuit, relying on the decision challenged here by petitioner Hughes Aircraft Company, reversed the district court's holding that the amended § 3730 does not apply retroactively. *Hyatt v. Northrop Corp.*, 80 F.3d 1425 (9th Cir. 1996). The Court of Appeals stated that "*Schumer* compels our holding that [the amended § 3730] applies retrospectively . . ." *Id.* at 1430 (citing *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995)). Consistent with its earlier decision in *Schumer*, the *Hyatt* court held that application of the amended version of § 3730 generally would not have a "retroactive effect" within the meaning of this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). See *Hyatt*, 80 F.3d at 1428-29. The court reasoned that the amended § 3730 would not alter the "underlying" liability of the contractor and that, in any event, the new statute was a "jurisdictional" provision that must be presumed to apply retroactively. *Id.*

The facts in *Hyatt* differ from those in *Schumer* in at least one critical respect: unlike the complaint in *Schumer*, the complaint in *Hyatt* was filed *before* the enactment of the amended statute on October 27, 1986. *Hyatt*, 80 F.3d at 1429. Accordingly, in responding to Hyatt's appeal to the Ninth Circuit, Northrop asserted that, at a minimum, the amended § 3730 could not be applied retroactively to a case filed before that date. Specifically, Northrop argued that the

various *qui tam* provisions of the amended § 3730 were not severable from one another and that, because portions of that section (such as the new requirement that the *qui tam* complaint must be filed initially under seal) obviously could not be applied retroactively, Congress intended that none of the *qui tam* amendments would be applied to an action that already had been filed. 80 F.3d at 1429-30. The Ninth Circuit rejected this argument, concluding that, because this Court in *Landgraf* had applied a section-by-section retroactivity analysis to the Civil Rights Act of 1991, a similar approach was warranted in *Hyatt*. *Id.*

On July 2, 1996, Northrop filed a petition for a writ of certiorari in this Court challenging the Ninth Circuit's holding in *Hyatt* that the 1986 amendments to the *qui tam* provisions of the FCA could be applied retroactively to a case in which all of the conduct occurred — and the lawsuit was filed — before the enactment of the amended statute. *See Hyatt* Pet. at 8-16. Because a decision by this Court reversing the Ninth Circuit on the retroactivity issue in *Schumer* would fatally undermine the Ninth Circuit's decision in *Hyatt*, Northrop has a direct interest in the outcome of this case.

Northrop agrees that, for the reasons stated in the brief of petitioner Hughes Aircraft Company ("Hughes"), the Ninth Circuit erred in applying the amended § 3730 retroactively in *Schumer*. In accordance with this Court's Rule 37.1, Northrop will not repeat those arguments here and instead respectfully submits this brief as *amicus curiae* in order to present this Court with two additional, alternative approaches to analyzing the retroactivity issue in *Schumer*.²

²Both of the alternative approaches described below would require reversal of the Ninth Circuit's judgment in *Hyatt*, but only the first would support a reversal in the instant case. Specifically, if this Court were to conclude — as set forth in the second approach discussed below — that the amended FCA should not be applied to *qui tam* suits

SUMMARY OF THE ARGUMENT

Under this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), a statute should not be applied to have retroactive effect absent clear congressional intent. A statute has a "retroactive effect" in a particular context if its application would "attac[h] new legal consequences to events completed before its enactment." *Id.* at 269-70. Prior to its amendment, § 3730 attached an important legal consequence to the fact that the government had knowledge of a particular FCA allegation — a *qui tam* suit based on that allegation was completely barred. *See* 31 U.S.C. § 3730(b)(4) (1982). By repealing this "prior government knowledge" defense, the amended § 3730 would have the retroactive effect of attaching new legal consequences to pre-enactment conduct in any case where the government acquired its knowledge of the relevant allegations before the new statute was enacted. Because the government was aware of the allegations at issue in this case before the statute was amended and before respondent *Schumer* filed suit, the Ninth Circuit erred in applying the new statute retroactively.

The Ninth Circuit declined to apply *Landgraf*'s presumption against retroactivity, holding that *Landgraf* "carved out an exception to that rule in the case of jurisdictional statutes." Pet. App. 6a. This conclusion was error. *Landgraf* notes that this Court's practice of "regularly appl[ying] intervening statutes conferring or ousting jurisdiction" is consistent with the presumption against retroactivity precisely *because* application of such statutes "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" 511 U.S. at 274 (citation omitted). *Landgraf* thus makes clear that its jurisdictional

filed *before* the enactment of the amended statute, that would not support reversal on this issue in *Schumer*, because the *qui tam* suit against petitioner was filed *after* that enactment.

"exception" extends only to those statutes that change the relevant tribunal without extinguishing substantive rights altogether. But in that sense, jurisdictional statutes reflect, not an "exception" to the normal rule, but an *application* of it: they are an identifiable class of statutes in which, under the standard principles set forth in *Landgraf*, there *ordinarily* will be no "retroactive effect."

In any event, the amended § 3730 is *not* a "jurisdictional" provision within the meaning of *Landgraf*. In concluding that the amended § 3730 is jurisdictional for retroactivity purposes, the Ninth Circuit relied *solely* on the fact that the relevant subsection uses the magic word "jurisdiction." Under *Landgraf*, however, a jurisdictional provision is one that "'speak[s] to the power of the court rather than to the rights or obligations of the parties.'" 511 U.S. at 274 (citation omitted). Here, despite the use of "jurisdictional" language, the amended § 3730 addresses, not the authority of courts, but the respective *substantive* rights of the contractor, the *qui tam* relator, and the United States.

The Ninth Circuit also erred in concluding that, because the amended § 3730 does not alter the underlying obligation of the contractor not to commit fraud, it would not have a retroactive effect. The Court of Appeals' conclusion on this point is flatly inconsistent with *Landgraf*'s holding that § 102 of the Civil Rights Act of 1991, which authorized the recovery of compensatory damages in Title VII cases, did not apply retroactively despite the fact that § 102 did "not make unlawful conduct that was lawful when it occurred." 511 U.S. at 281-82. Moreover, under the general principles set forth in *Landgraf*, a statute has retroactive effect, not only if it would "impose new duties with respect to transactions already completed" (thereby altering the "underlying liability"), but *also* if application of the statute would "impair rights a party possessed when he acted" or "increase a party's liability for past conduct." *Id.* at 280. Application

of the amended § 3730 has both these latter effects: by reviving a barred cause of action, it eliminates a defense and increases petitioner's liability.

The Ninth Circuit's decision also ignores the fact that application of the new § 3730 would alter significantly the *government's* pre-existing rights under the FCA. In particular, as the government argued in *Hyatt*, retroactive application of the amended § 3730 would operate to deprive the government of its right to 100% of the recovery based on allegations previously known to it. Indeed, in several cases where the government has sought *independently* to pursue such previously known allegations, the government has successfully objected that retroactive application of the amended § 3730 would alter its pre-existing substantive rights. The fact that application of the amended § 3730 would have such an effect in many cases confirms that, under the *Landgraf* presumption, Congress did not intend the provision to apply retroactively at all.

For all of these reasons, this Court should reverse the judgment of the Ninth Circuit and hold that the FCA amendment's repeal of the "prior government knowledge" defense cannot be applied retroactively to a case, such as this one, in which the government acquired its knowledge of the allegations prior to the enactment of the amended statute.

Even if this Court were to determine that the amended § 3730 may be applied retroactively to the facts of the instant case, however, the Court should nonetheless make clear that a similar result would not obtain in a case in which the *qui tam* complaint was filed *before* the enactment of the amended FCA. Under the text of both the former and current versions of § 3730, the applicability of the *qui tam* bar is inextricably tied to the date of the filing of the suit. This fact strongly suggests that Congress intended, at a minimum, that the new version would not be applied to suits

filed before its enactment. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838-39 (1990). Moreover, because the amended statute creates a dramatically different incentive structure that in many circumstances reverses what a relator must do to bring a *qui tam* suit, Congress clearly did not intend for the statute to govern suits filed before the date of enactment. Finally, this construction of the statute is confirmed by the fact that the amended § 3730 contains several provisions (such as an under-seal filing requirement) that *cannot* be applied to a suit filed under the prior law; because the various provisions of that section are *not* severable from one another, no portion of it should be applied retrospectively to a suit filed before enactment.

ARGUMENT

A. The Amended FCA's Elimination of the "Prior Government Knowledge" Defense to a *Qui Tam* Action Cannot Be Applied Retroactively to a Case in Which the Government Acquired Its Knowledge Prior to the Enactment of the Amended Statute

In *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), this Court held that, absent clear congressional intent, a statute should not be applied to have retroactive effect. A statute has a "retroactive effect" in a particular context if its application would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* In short, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70. Application of these principles makes clear that the amended § 3730, by eliminating the "prior government knowledge" defense, has a retroactive effect within the meaning of *Landgraf*.

1. Application of the Amended § 3730 in the Instant Case Would Have a "Retroactive Effect" Within the Meaning of *Landgraf*

In order to determine whether a subsequently enacted federal statute would attach new consequences to pre-enactment conduct, one must first identify the relevant conduct that would be affected by the application of the new statute. *Landgraf*, 511 U.S. at 269-70, 280; see also *id.* at 291 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment) (stating that the "critical issue" is "what is the relevant activity that the rule regulates"). Here, the conduct that is affected by the amendment of § 3730 is the disclosure of information to the government. See *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814-15 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 700 (1996). That is, prior to its amendment, § 3730 attached an important legal consequence to the fact that the government had knowledge of a particular FCA allegation—a *qui tam* suit based on that allegation was completely barred, even if the *qui tam* relator was the source of the government's prior knowledge. See 31 U.S.C. § 3730(b)(4) (1982); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103-06 (7th Cir. 1984); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 669-73 (9th Cir. 1978). Moreover, by precluding *qui tam* liability for any conduct that was known to the government, § 3730 provided a significant additional incentive for federal contractors to make full, voluntary disclosures to the government. See Waldman, *The 1986 Amendments to the False Claims Act: Retroactive or Prospective?*, 18 Pub. Cont. L.J. 469, 481 (1989). Thus, a contractor could avoid the burden of a strike suit brought by a disgruntled *qui tam* relator simply by keeping the govern-

ment informed about issues and problems that might arise during the performance of the contract.³

The new § 3730 significantly alters the legal consequences of the government's prior knowledge in two important respects: (1) it no longer bars *qui tam* suits based on allegations known to the government at the time the suit was filed; and (2) if the allegations have been "public[ly] disclos[ed]," then only an "original source" of the allegations may bring a *qui tam* suit, and any such putative relator is *required* to disclose the allegations to the government *before* bringing suit. 31 U.S.C. § 3730(e)(4) (1988). In view of these changes, the amended § 3730 would have the retroactive effect of "attach[ing] new legal consequences" to pre-enactment conduct in any case where the government acquired its knowledge of the relevant allegations before the new statute was enacted.

This analysis makes clear that the amended § 3730 would have a retroactive effect in the instant case. The Ninth Circuit expressly assumed, for purposes of its decision, that the government was aware of the allegations in Schumer's complaint *before* the enactment of the 1986 amendments. Pet. App. 6a, n.1. Accordingly, under the version of the FCA in effect at the time the government acquired this knowledge, Schumer's *qui tam* action was barred. 31 U.S.C. § 3730(b)(4) (1982); *Dean*, 729 F.2d at 1103-06; *Pettis*, 577 F.2d at 669-73. Application of the amended version of the FCA would lift this bar and allow Schumer's *qui tam* suit to go forward, thereby "attach[ing] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. As such, the new statute would have a "retroactive effect" and must not be applied absent clear

³In *Hyatt*, for example, Northrop informed the government about routine development problems and, when two specific issues arose, Northrop conducted internal investigations and disclosed the results of those investigations to the government. See *Hyatt* Pet. at 2-3.

congressional intent. Because "Congress did not demonstrate an intent that the FCA [amendments] should apply retrospectively," Pet. App. 6a, the amended § 3730 may not be applied in the instant case.

2. The Ninth Circuit's Reasons for Retroactively Applying the Amended § 3730 to This Case Are Fatally Flawed

In reaching a contrary conclusion, the court below did not (and could not) dispute that application of the amended § 3730 significantly altered the legal consequences of the pre-amendment disclosures of information to the government. The Ninth Circuit, however, declined to apply *Landgraf's* presumption that "a statute altering substantive rights applies only prospectively," holding that *Landgraf* "carved out an exception to that rule in the case of jurisdictional statutes." Pet. App. 6a. In construing the scope of this "exception," the Court of Appeals read *Landgraf* as establishing a "strong presumption that jurisdictional statutes apply retrospectively" and held that this latter presumption can be rebutted only by a showing that retroactive application would "infringe on the substantive rights of the defendant" by "'alter[ing] [the defendant's] underlying liability.'" Pet. App. 7a (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995)); see also *Lindenthal*, 61 F.3d at 1408 (concluding that the amended statute was a "jurisdictional" rule that "simply did not alter [the defendant's] underlying obligation not to commit fraud upon the government.").

As set forth below, the Ninth Circuit's analysis is fatally flawed in at least four separate respects.

a. Under *Landgraf*, "Jurisdictional" Provisions Are Governed by the Same Retroactivity Principles As Other Legislation

As a threshold matter, the Ninth Circuit was simply wrong in reading *Landgraf* as "carv[ing] out an exception" to the normal presumption against retroactivity and as creating a counter-presumption *in favor* of retroactivity for "jurisdictional" statutes. On the contrary, *Landgraf* makes clear that jurisdictional statutes are governed by exactly the same retroactivity principles as other legislation.

In the portion of the opinion relied upon by the Ninth Circuit, *Landgraf* notes that this Court's practice of "regularly appl[ying] intervening statutes conferring or ousting jurisdiction" is consistent with the presumption against retroactivity precisely *because* application of such statutes "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). In other words, "[p]resent law *normally* governs in such situations because jurisdictional statutes 'speak to the power of the court *rather than to the rights or obligations of the parties.*'" *Id.* (quoting *Republic National Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)) (emphasis added). *Landgraf* thus makes clear that its jurisdictional "exception" extends only to those statutes that change the relevant tribunal without extinguishing substantive rights altogether.⁴ But in that sense,

⁴Indeed, every case cited by *Landgraf* as involving a "jurisdictional" amendment is consistent with this rule. See *Andrus v. Charleston Stone Products Co.*, 436 U.S. 604, 607-08 n.6 (1978) (although prior basis for jurisdiction was held invalid by this Court in 1977, a 1976 statute could be applied to save jurisdiction over suit, which "appeared jurisdictionally correct when filed"); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (new statute expanded class of persons who could be sued but action was only for prospective relief); *Bruner v. United States*, 343

jurisdictional statutes reflect, not an "exception" to the normal rule, but an *application* of it: they are an identifiable class of statutes in which, under the standard principles set forth in *Landgraf*, there *ordinarily* will be no "retroactive effect."⁵

Application of those standard principles in the instant case compels the conclusion that Hughes' substantive rights would be retroactively altered if the amended § 3730 were applied here. The new statute does not reassign a claim from

U.S. 112, 117 (1952) (change of law "has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (statutory reassignment of claim from judicial to administrative forum "takes away no substantive right, but simply changes the tribunal that is to hear the case"); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899) (statute granting new appellate rights did not "destro[y] any vested right" and language of the statute required it to be applied retrospectively); *The Assessor v. Osbornes*, 9 Wall. (76 U.S.) 567, 572-75 (1870) (repeal of federal jurisdiction over certain tax actions meant that such suits "must be commenced in the State Courts").

⁵The correctness of this reading of *Landgraf* is confirmed by the fact that Justice Scalia, writing separately in *Landgraf*, interpreted the Court's opinion in exactly the same way. He specifically objected to the majority's view that the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction" is explained by the fact that such statutes "'tak[e] away no substantive right but simply chang[e] the tribunal that is to hear the case.'" 511 U.S. at 292 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment) (quoting maj. opin. at 274) (additional internal quotation marks and citation omitted). Justice Scalia argued, contrary to the *Landgraf* majority, that a "jurisdictional" statute *always* should be applied to "prevent any judicial action after the statute takes effect" even if doing so would destroy a substantive right. *Id.* at 292-93. That does not suggest, however, that the Ninth Circuit's decision here was correct under Justice Scalia's approach; on the contrary, that decision is still wrong for the additional reason that the amended § 3730 is *not* a "jurisdictional" provision within the meaning of either the majority or the concurring opinions in *Landgraf*. See *infra* at 14-15.

one tribunal to another without extinguishing substantive rights; on the contrary, it eliminates a pre-existing defense ("prior government knowledge") and reformulates a new one ("public disclosure"). Accordingly, even assuming *arguendo* that § 3730 is a "jurisdictional" provision, the Ninth Circuit erred in concluding that it could be applied retroactively in this case.

b. In Any Event, the Amended § 3730 Is Not a "Jurisdictional" Provision Within the Meaning of *Landgraf*

At any rate, the amended § 3730 is *not* a "jurisdictional" provision within the meaning of *Landgraf*. In concluding that the amended § 3730 is jurisdictional for retroactivity purposes, the Ninth Circuit relied *solely* on the fact that the relevant subsection uses the term "jurisdiction":

Because the 1986 amendment explicitly effects a jurisdictional bar, see 31 U.S.C. § 3730(e)(4) ("No court shall have jurisdiction . . ."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992), we presume that it applies to the present action.

Pet. App. 7a (ellipses in original).

This "magic words" analysis is plainly deficient. As petitioner notes in its brief, Congress routinely expresses limitations on causes of actions or on available forms of relief in jurisdictional terms, but that, standing alone, does not imply that such provisions are "jurisdictional" in the sense described in *Landgraf*. In the *Landgraf* majority's view, a jurisdictional provision is one that "speak[s] to the power of the court rather than to the rights or obligations of the parties." 511 U.S. at 274 (citation and internal quotation marks omitted). The *Landgraf* concurrence similarly described jurisdictional provisions as being those whose "purpose . . . is to permit or forbid the exercise of judicial power," *id.* at 293 (Scalia, J., concurring) (emphasis ad-

ded). These definitions make clear that not every statute that uses the magic word "jurisdiction" will be "jurisdictional" in the more narrow sense in which that term is used in the *Landgraf* opinions. For example, if Congress repealed a statute stating that "no court shall have jurisdiction to award punitive damages" and instead enacted a statute conferring such "jurisdiction," the resulting increase in the extent of the defendant's liability would unquestionably constitute a "retroactive effect" under *Landgraf*. See 511 U.S. at 281.

Here, despite the use of "jurisdictional" language, the amended § 3730 addresses, not the authority of courts, but the respective *substantive* rights of the contractor, the *qui tam* relator, and the United States. That is, by eliminating the "prior government knowledge" defense and thereby altering the circumstances in which a *qui tam* action may be maintained against a contractor, the amended statute is aimed, not at restricting the power of courts, but in reallocating rights among the various parties whose interests are at stake in *qui tam* actions.

c. *Landgraf* Makes Clear That the Amended § 3730 May Not Be Applied Retroactively Even Though It Does Not Alter the Underlying Obligations of the Contractor

The Ninth Circuit also erred in concluding that, because the amended § 3730 does not alter the underlying obligation of the contractor not to commit fraud, application of that provision here would not have a retroactive effect. Pet. App. 7a. The Ninth Circuit's conclusion on this point is flatly inconsistent with the holding of *Landgraf*. The *Landgraf* Court held that § 102 of the Civil Rights Act of 1991, which authorized the recovery of compensatory damages for "discriminatory conduct already prohibited by Title VII," did not apply retroactively *despite the fact that § 102 did "not make unlawful conduct that was lawful when it occurred."*

511 U.S. at 281-82 (emphasis added); see also *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994) (noting that, because § 102 expanded the applicable monetary liability, it could not be applied retroactively even though "it did not alter the normative scope of Title VII's prohibition on workplace discrimination").

Indeed, the general principles set forth in *Landgraf* make clear that an alteration of the underlying substantive obligation is not the only way in which a new statute may have a retroactive effect. Such an effect exists whenever a "new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. Accordingly, a statute has retroactive effect, not only if it would "impose new duties with respect to transactions already completed" (thereby altering the "underlying liability" in the manner described by the Ninth Circuit), but also if application of the statute would "impair rights a party possessed when he acted" or "increase a party's liability for past conduct." *Id.* at 280. Application of the amended § 3730 has both these latter effects: by reviving a barred cause of action, it eliminates a defense and increases petitioner's liability.⁶ Thus, even if the amended § 3730 is construed as merely "giv[ing] a more efficient and a more complete remedy" for enforcing

⁶The revival of Schumer's barred action is, for example, no less retroactive in its practical effect than the revival of a claim that is barred by the defense of limitations, and it is well established that, absent clear congressional intent, an amended statute of limitations "may not be applied retroactively to revive a claim that would otherwise be stale under the old scheme." *Chenault v. United States Postal Service*, 37 F.3d 535, 538 (9th Cir. 1994); see also *United States v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985), cert. denied, 476 U.S. 1142 (1986); *Herm v. Stafford*, 663 F.2d 669, 683 & n.20 (6th Cir. 1981); cf. *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (plain language of new provision expressed Congress' clear intent to revive time-barred actions then pending before the EEOC).

a pre-existing duty, the statute must not be applied retroactively where, as here, doing so would "tak[e] away material defenses, — defenses which did something more than resist the remedy; they disproved the right of action." *Winfrey v. Northern Pacific Ry. Co.*, 227 U.S. 296, 301-02 (1913).

In *Hyatt*, the Ninth Circuit also held that the new *qui tam* provisions have no retroactive effect because any underlying liability could also be enforced through "'an action brought directly by the government.'" 80 F.3d at 1429 (quoting *Lindenthal*, 61 F.3d at 1408). This argument, however, is based on the same assumption that a statute can have a retroactive effect only if it alters the "underlying liability"; because that premise is wrong, this argument likewise is unavailing.

Moreover, *Landgraf* expressly states that a statute may have a retroactive effect if it creates a new "mechanism that affects the liability of defendants." 511 U.S. at 282. That is exactly what the amended § 3730 does here. Because the government declined to pursue Schumer's allegations, application of the new § 3730 clearly would affect petitioner's liability because it is the *sole* determinant of whether petitioner will be haled into court in this case. Indeed, the Ninth Circuit's contrary view would lead to the utterly astonishing conclusion that there would be no "retroactive effect" were Congress retrospectively to create brand new *qui tam* causes of action to enforce pre-existing obligations under other federal statutes.⁷

⁷The elimination of the "prior government knowledge" defense "is also the type of legal change that would have an impact on private parties' planning." *Landgraf*, 511 U.S. at 282. Retroactively applying the new statute — especially in cases such as *Hyatt*, that were filed before the statute was amended — operates unfairly to deprive the contractor of the benefit derived from having taken the steps necessary to avoid a *qui tam* suit under the prior statute.

d. The Amended § 3730 Must Not Be Applied Retroactively Because It Alters the Substantive Rights of the Government

The Ninth Circuit also erred in failing to consider that retroactive application of the new § 3730 would alter significantly the *government's* pre-existing rights under the prior version of the FCA. In *Hyatt*, for example, the government vigorously argued in the district court that the amended § 3730 should not be applied retroactively, in part because it would interfere with the government's substantive rights:

In the present case, . . . the lifting of the jurisdictional bar would result, if the relators are successful, in depriving the government of its right to 100% of the recovery based on allegations previously known to the government. Under the former False Claims Act, any allegations based on information previously disclosed to the government were reserved for the government alone. Even if the United States declined to enter an appearance it could, at a later time, institute a suit against the defendant based upon those allegations. Whatever recovery resulted was the government's alone. If the relators are now permitted to go forward with actions previously reserved for the government, the relators will also be permitted to share in the recovery. The government could not, at a later time, institute actions against the defendant based on the same conduct. The government would benefit by receiving a share of the recovery, of course, but would suffer to the extent that it would have to share its recovery with the relators.

Northrop's C.A. Excerpts of Record, *Hyatt v. Northrop Corp.*, Nos. 94-55578 & 94-55638, at 64-65 ("*Hyatt E.R.*") (quoting government's brief).⁸

The government's argument against retroactivity in *Hyatt* was not merely hypothetical. On the day before the government filed its brief seeking dismissal of *Hyatt's qui tam* suit, the government filed an *independent* FCA action raising one of the issues that had been contained in *Hyatt's* complaint. *Hyatt E.R.* 148, 302.⁹ Similarly, in *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994), the government intervened and took over the relators' *qui tam* suit and then moved to preclude the relators from sharing in any recovery the government might obtain, arguing that the relators' participation was barred by the "prior government knowledge" defense and that the amended statute could not be applied retroactively. *Id.* at 420.

The fact that application of the amended § 3730 plainly would alter the government's substantive rights confirms that, under the *Landgraf* presumption, Congress did not intend the provision to apply retroactively *at all*. Accordingly, the amended § 3730 may not be applied in the instant case even though the government did not interpose an objection in *Schumer* as it did in *Hyatt* and *TRW*.¹⁰

⁸In opposing a grant of certiorari in this case, the Solicitor General simply ignored this retroactive effect of the amended § 3730 and made no effort to explain why the government has now reversed its position on the retroactivity of that provision. See U.S. Br. re: cert. pet. at 7-10.

⁹Ultimately, the government's FCA suit was voluntarily dismissed after Northrop agreed to make a \$45,050 adjustment to the contract price. *Hyatt E.R.* 300-07. In the agreement, Northrop expressly denied any wrongdoing in connection with these allegations. *Id.* at 305.

¹⁰At a minimum, however, this Court should hold that the amended § 3730 may not be applied retroactively in any case where the govern-

These four errors in the Ninth Circuit's opinion establish that that court erred in retroactively applying the amended § 3730 to this case. This Court should reverse the judgment of the Ninth Circuit and hold that the FCA amendments' repeal of the "prior government knowledge" defense cannot be applied retroactively to a case in which the government acquired its knowledge of the allegations prior to the enactment of the amended statute.

B. At A Minimum, the Amended FCA's Elimination of the "Prior Government Knowledge" Defense to a *Qui Tam* Action Cannot Be Applied Retroactively to a Case That Was Filed Prior to the Enactment of the Amended Statute

Even if this Court were to determine that the amended § 3730 may be applied retroactively to the facts of *Schumer*, the Court should nonetheless make clear that a similar result would not obtain in a case in which the *qui tam* complaint was filed *before* the enactment of the amended FCA. For several reasons, it is apparent that, at a minimum, Congress did not intend the amended § 3730 to apply retroactively to a case that was pending on the date that provision was enacted.

By focusing on the date that a *qui tam* suit is filed, the text of both the former and current versions of § 3730 reflect Congress' intent that the repeal of the "prior government knowledge" defense would not apply to suits filed before enactment of the amended statute. Under the prior statute, a *qui tam* action is barred if it is "based on evidence or information the Government had *when the action was brought*." 31 U.S.C. § 3730(b)(4) (1982) (emphasis added). Similarly, the current statute bars *qui tam* suits based upon "public[ly] disclos[ed]" allegations "unless . . . the

ment has specifically objected that the statute would operate in derogation of the government's pre-existing substantive rights.

person *bringing the action* is an original source of the information" and "has voluntarily provided the information to the Government *before filing [the] action*" 31 U.S.C. § 3730(e)(4) (1988) (emphasis added). Because, under both versions, the applicability of the *qui tam* bar is "inextricably tied" to the date of the filing of the suit, "the most logical reading of the statute" is that, at a minimum, the new version should not be applied to suits filed before its enactment. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838-39 (1990).

This analysis is elucidated and confirmed by this Court's decision in *Kaiser*. In that case, Congress had amended 28 U.S.C. § 1961, which sets forth the applicable post-judgment interest rate, *after* the district court's judgment in *Kaiser* was entered but before the interest was calculated and assessed. 494 U.S. at 829-32. Although the amended statute did not expressly state whether the new interest rate would apply in such circumstances, the Court noted that § 1961, "originally and as amended," provides that the "starting point" for the accrual of interest is "the date of the entry of judgment." *Id.* at 838. Because, "[u]nder both versions of § 1961, the calculation of interest is inextricably tied to the date of the entry of judgment," the Court held that "the most logical reading of the statute is that the interest rate for any particular judgment is to be determined as of the date of the judgment. . . ." *Id.* at 838-39. Similarly, the fact that, under both versions of § 3730, the applicability of the *qui tam* bar is "inextricably tied" to the date of the filing of the complaint strongly suggests that, at a minimum, the appropriate version of the *qui tam* bar is to be determined as of the date of that filing.

Congress' expectation that the amended § 3730 would apply only prospectively to suits filed after enactment is further reflected by the dramatically different incentive structure that the new statute creates. Before the 1986

amendments, a *qui tam* plaintiff would lose his or her cause of action by disclosing the allegations to the government prior to filing suit, *see, e.g., Pettis*, 577 F.2d at 669-73, but under the amended § 3730, a *qui tam* plaintiff who is an "original source" of publicly disclosed allegations cannot bring suit *unless* the allegations were voluntarily disclosed to the government prior to the filing of the suit. 31 U.S.C. § 3730(e)(4)(B). By *reversing* in many circumstances what a relator must do to bring a *qui tam* suit, the amended statute makes clear that it was not intended to govern suits filed before the date of enactment. *Cf. Kaiser*, 494 U.S. at 839-40 (Court's refusal to apply the amended § 1961 retroactively was supported by the fact that the amended interest rate would have changed the expectations upon which parties made "informed decisions about the cost and potential benefits of paying the judgment or seeking appeal").

Finally, Congress' intent that the amended § 3730 would apply only to suits filed after enactment is confirmed by the fact that the new statute contains several provisions (such as an under-seal filing requirement) that *cannot* be applied to a suit filed under the prior law. The Ninth Circuit rejected this argument in *Hyatt*, concluding that the *Landgraf* opinion *requires* a court to decide the question of retroactivity on a subsection-by-subsection basis. 80 F.3d at 1429-30. This conclusion, however, is based on a clear misreading of this Court's decision in that case.

Landgraf applied a section-by-section approach *only* because it found "no special reason to think that all the diverse provisions of the [Civil Rights] Act must be treated uniformly for such purposes." 511 U.S. at 280. The 1986 FCA amendments are quite different. As the government pointed out during the district court proceedings in *Hyatt*, *see Hyatt* E.R. 58-61, the various provisions of the amended § 3730 were the result of a carefully crafted compromise in which Congress simultaneously expanded *qui tam* rights while

placing important restrictions on the exercise of those rights; accordingly, those provisions simply are *not* severable from one another.¹¹ *Cf. United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 162-63 (1914) ("the limitations upon [a newly created] liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself"). Because the under-seal filing requirements cannot retroactively be complied with, *see Landgraf*, 511 U.S. at 275 n.29, it follows that no portion of § 3730 should be applied retrospectively. *See United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 316-17 (1908) ("[W]e see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion of it made applicable to cases already existing and other portions applicable only to the future.");

¹¹ In *Hyatt*, the government explained the FCA amendments as follows:

Subsection (b)(2) of section 3730 imposes new requirements that all *qui tam* actions "shall" be filed *in camera*, "shall" remain under seal for a period of at least 60 days, and "shall not" be served upon the defendant until the court so orders. 31 U.S.C.A. § 3730(b)(2) (1987 pocket part). . . .

The legislative history indicates that this section was the subject of much concern, and that the final provisions adopted were the product of compromise between a perceived need to expand the *qui tam* rights and a fear that these provisions could be abused if left unchecked. *See generally* S. Rep. No. 345, 99th Cong., 2d Sess. 14, 16, and 24-25 (1986); *Cong. Rec.* S15036 (daily ed. October 3, 1986); *Cong. Rec.* H9388-9389 (daily ed. October 7, 1986). The protective provisions of subsection (b)(2), section 3730, were inserted to protect the government and the defendant. "The Committee feels that sealing the initial private civil false claims complaint protects *both the government and the defendant's interests* without harming those of the private relator." S. Rep. No. 345, 99th Cong., 2d Sess. 24 (1986) (emphasis added). *Hyatt* E.R. 58-59.

see also *United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985).

For all of these reasons, it is plain that, at a minimum, the amended § 3730 should not be applied to cases filed before the enactment of that statute. Accordingly, even if this Court determines that the amended statute may be retroactively applied in the instant case (which was filed *after* enactment of the FCA amendments), it should make clear that a contrary conclusion would be required in cases filed before enactment.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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